FILE COPY

Office-Supreme Court, U.S.
FILED
MAY 16 1959
JAMES R. BROWNING, Clerk

No. 866

IN THE

Supreme Court of the United States

October Term, 1958

JOSEPH M. BRENNAN, Petitioner,

versus

W. A. WILLS, LTD.; W. A. WILLS, HERMAN SPEKEN; WILLIAM GREENBERG, HERBERT KORHOLZ; SPEKEN WRECKING CO.; ROCK WOOL INSULATING COMPANY, a Colorado corporation, and M.P.M. INVESTMENT COMPANY, a Delaware corporation, Respondents.

BRIEF OF RESPONDENTS W. A. WILLS, LTD., W. A. WILLS, HERMAN SPEKEN, WILLIAM GREENBERG, HERBERT F. KORHOLZ AND SPEKEN WRECKING CO. IN OPPOSITION TO PETITION FOR CERTIORARI

GORSUCH, KIRGIS, CAMPBELL, WALKER AND GROVER
By CHARLES E. GROVER
222 Equitable Building
Denver 2, Colorado
Attorneys for Respondent

Of Counsel:
JACK F. SEAVY
Thatcher Building
Pueblo, Colorado

May, 1959

EASTWOOD PRINTING CO. • 2854 LARIMER • DENVER 5, COLO.

INDEX

	PAGE
Statement of the Case	1
The Petition Fails to State Any Ground for Certiorari	4
Answer to Petitioner's Alleged Reasons for Granting the Writ	5
Conclusion	25
Appendix	26

CASES CITED

American Surety Co. v. Baker, 172 F. 2d 689 (4th Cir. 1949)	9
Anderson v. Courtney, 203 Okla. 71, 218 P. 2d 361 (1950)	8
Baron v. Peoples National Bank of Secaucus, 15 N.J. Super. 243, 84 A. 2d 492 (1951)	14, 15
Benesch v. Waggoner, 12 Colo. 534, 21 P. 706 (1889)	13
Black v. Zacharie, 3 Howard 483, 11 L. Ed 690 (1845)	8
Blackmer v. Blackmer, 87 Colo. 483, 289 P. 366 (1930)	15, 24
Bowles v. Jung, 57 F. Supp. 701 S.D. (Calif. C. D. 1944)	9
Carass v. Outboard Marine Corp., 252 F. 2d 690 (5th Cir. 1958)	22
Clay v. Martinez, 74 Colo. 10, 218 P. 903 (1923)	14
Cook v. Ball, 144 F. 2d 423 (7th Cir. 1939)	7
Crump v. Hill, 105 F. 2d 124 (5th Cir. 1939)	9

PAGE

Denver Onyx & Marble Manufacturing Co. v. Reynolds, 72 F. 464 (10th Cir. 1895) 15, 24

Dietrick v. Greany, 309 U.S. 190, 6, 84 L. Ed. 694 (1939) 21

Dotschay v. National Mutual Insurance Company of the District of Columbia, 264 F. 2d 221 (5th Cir. 1957) 21

Fardy v. Mayerstein, 221 Ind. 339, 47 N.E. 2d 315, 317 (1943) 23

German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220, 234, 33 S. Ct. 32, 36 (1912) 6

Gross v. Dreiling, 127 Colo. 420, 257 P. 2d 402 (1953) 12, 14

Hanauver v. Bartels, 2 Colo. 514 (1875) 13

Hardware Mutual Insurance Co. v. Snyder, 137 F. Supp. 812 (W.D. Penn. 1956) 22

Harris v. Egger, 226 F. 389, 395 (6th Cir. 1915) 18, 19

Harrison v. City and County of Denver, 102 Colo. 98, 103, 76 P. 2d 110 (1938) 14

Hatch v. Std. Oil Co., 100 U.S. 124, 25 L. Ed. (10 Otto) 554 (1879) 8

Helvering v. Kaufman, 136 F. 2d 356 (4th Cir. 1943) 8, 10

Illinois Sewing Machine Co. v. Harrison, 43 Colo. 362, 3, 96 P. 177 (1908) 13

In re Millard's Estate, 77 Pa. D. & C. 97 (1911) 9

In re Rogers, 20 F. Supp. 120 (N.D. W. Va. 1937) 12, 14

In re Spain's Estate, 46 N.Y.S. 2d 789 (1944) 9

INDEX (CONTINUED)

	PAGE
Journeymen Barbers v. Pollino, 39 N.J. Super. 250, 120 A. 2d 767 (1956)	14
Knight v. Shutz, 141 Ohio St. 267, 47 N.E. 2d 886	5
Leonard v. Davis, 1 Black 476, 66 U.S. 222 (1861)	8
Livingston v. Powell, 257 Ala. 38, 57 S. 2d 521 (1952)	9
Lyons v. Freshman, 124 Mont. 485, 226 P. 2d 775 (1950)	10
McLeod v. Fourth National Bank of St. Louis, 122 U. S. 528, 30 L. Ed. 1237 (1887)	12
Miller v. Hospelhorn, 176 Md. 356, 4 A. 2d 728 (1939)	10
Miller v. Wahyou, 235 F. 2d 612 (9th Cir. 1956)	13
Mullane v. Central Hanover Bank and Trust Company, 70 S. Ct. 652, 339 U.S. 306 (1950)	16
Olan v. Enterprise Publishing Company, 210 F. 2d 895 (5th Cir. 1954)	19
Ogden v. Saunders, 12 Wheat. 213, 233, 6 L. Ed. 606	7
Pac. Coop. v. U. S., 91 F. Supp. 572 (Ct. Cl. 1952)	9
Parsons v. Dist. Ct. of Columbia, 170 U.S. 45, 51, 18 S. Ct. 521, 523, (1898)	7
Polk v. Glover, 305 U.S. 5, 6 (15-16), 83 L. Ed. 6 (1938)	22
Reeves v. Stokel, 120 Colo. 82, 208 P. 2d 94 (1949)	11, 14
Richardson v. Commissioner of Internal Revenue, 126 F. 2d 562 (2d Cir. 1942)	10
Ryan v. Scoggin, 10 Cir., 245 F. 2d 54, 57 (10th Cir. 1957)	21

INDEX (CONTINUED)

	PAGE
Shipton v. Norrid, 1 Colo. 404 (1872)	13
Slaughter v. Glenn, 98 U.S. 242, 25 L. Ed. 122 (1878)	8, 9
Societe Internationale v. Rogers, 357 U.S. 197, 2 L. Ed. 2d 255, 78 S. St. 1087 (1958)	24
Somerville National Bank v. Hornblower, 393 Mass. 363, 199 N.E. 918 (1936)	14
St. Aubin v. Marshall Field Co., 27 Colo. 414, 62 P. 199 (1900)	13
Stanton v. Larsh, 239 F. 2d 104, 106 (5th Cir. 1956)	21
Stearns v. U. S., 291 U.S. 54, 61, 78 L. Ed. 647 (1934)	16
Talty v. Freedman's Trust Co., 93 U.S. 321, 23 L. Ed. 886 (1876)	8, 12
Tome v. Dubois, 6 Wall. 548, 73 U.S. 548, 18 L. Ed. 943 (1866)	7, 8
U. S. v. Am. Nat. Bank of Jacksonville, 255 F. 2d 504, 506 (1958)	18
U. S. v. Butt, 203 F. 2d 643 (10th Cir. 1953)	7
U. S. v. Rosebush, 45 F. Supp. 664 (E.D. Wis. 1942)	10, 14
U. S. v. San Francisco Electric Contractor's Ass'n., 57 F. Supp. 57 (N.D. Calif. S.D. 1944)	9
Webster v. Kautz, 22 Colo. App. 111, 123 P. 139 (1912)	13
Williams v. Williams, 274 P. 2d 359 (Okla. 1954)	14
Winslow v. Fletcher, 53 Conn. 390, 4 A. 250 (1886)	9
Woods v. Klobuchar, 257 F. 2d 313 (7th Cir. 1958)	17

INDEX (CONTINUED)

PAGE

STATUTES AND RULES CITED

Colorado Rev. Stats. Chap. 31, Art. 9, Sec. 1 2

Colorado Rev. Stats. Chap. 31, Art. 9, Sec. 10 3

Colorado Rules of Civil Procedure, Rule 104 — Replevin 11

Rules of the Supreme Court of the United States, Rules 19, 23 4

MISCELLANEOUS CITATIONS

46 Am. Jur. Secs. 22, 23 ..... 5, 15

11 Fletcher, Cyclopedia of Corporations, Para. 5097.. 15.

Restatement-Trusts, Sec. 2, Comment (d), Title and Ownership defined 17

IN THE

Supreme Court of the United States

October Term, 1958

No. 866

JOSEPH M. BRENNAN, Petitioner,

versus

W. A. WILLS, LTD.; W. A. WILLS, HERMAN SPEKEN; WILLIAM GREENBERG, HERBERT KORHOLZ; SPEKEN WRECKING CO.; ROCK WOOL INSULATING COMPANY, a Colorado corporation, and M.P.M. INVESTMENT COMPANY, a Delaware corporation, Respondents.

BRIEF OF RESPONDENTS W. A. WILLS, LTD., W. A. WILLS, HERMAN SPEKEN, WILLIAM GREENBERG, HERBERT F. KORHOLZ AND SPEKEN WRECKING CO. IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Petitioner's statement of the case is erroneous and misleading in several respects and for this reason we make a short statement of the material facts.

The third amended complaint of Joseph M. Brennan, Petitioner, filed in the United States District Court for the District of Colorado, alleged that one Melia purchased 50 shares of the capital stock of Rock Wool Insulating Company, a Colorado corporation, and received stock certificate No. 46 representing such stock (R. 12). The com-

plaint also alleged that on or about September 11, 1952, Melia and his wife, May B. Melia, entered into an agreement with W. A. Wills, Ltd., at Pueblo, Colorado, wherein said certificate of stock No. 46 was pledged by said Melias as security for a loan of $1,200.00. (R. 14). The complaint also alleged that on August 13, 1954, Melia and his wife, sold, assigned, and transferred all right, title and interest in stock certificate No. 46 to the Petitioner by a written instrument but did not deliver stock certificate No. 46 (R. 14).

The District Court entered a judgment and order to dismiss the third amended complaint in replevin October 30, 1957 on the ground that the Plaintiff had no title to the certificate of stock which he sought to replevin in that the said third amended complaint failed to show a compliance with the statutes of the State of Colorado necessary to transfer title to a certificate of stock and to the shares represented thereby from the record owner of said stock certificate to the plaintiff (R. 30).

The statement made by the Petitioner on page 6 of his petition that "the court on its own motion granted Petitioner leave to file a third amended complaint to include additional party defendants . . ." is inaccurate. The order (R. 10) does not refer to additional parties and no order to issue summonses to additional parties was ever granted.

On appeal the Court of Appeals affirmed the judgment of the District Court and in its opinion stated the following with reference to the statutes replied upon by the District Court (appendix, Petition for Writ of Certiorari, pp. 20, 21):

> "it is provided by statute in Colorado, C.R.S. 1953, 31-9-1, that title to a certificate and to the shares of

stock represented thereby can be transferred only by delivery of the certificate endorsed either in blank or to a specified person by the person appearing in the certificate to be the owner of such stock, or by delivery of the certificate and a separate written assignment of the certificate or of a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. And it is further provided by statute in that state, C. R. S. 1953, 31-9-10, that an attempted transfer of title to a certificate of stock or to the shares represented thereby without delivery of such certificate shall have the effect of a promise to transfer; and that the obligation, if any, imposed by such promise shall be determined by the law governing the formation and performance of contracts. When these statutes are considered together, it is clear that in Colorado legal title to shares of stock issued by a corporation organized under the law of that state can be effectively transferred in only one or the other of two methods. One method is by delivery of the certificate with an endorsement thereon in blank or to a specified person, signed by the person appearing in the certificate to be the owner thereof. The other is by delivery of the certificate and a separate document containing a written assignment or a power of attorney to sell, assign, or transfer the same, signed by the person appearing in the certificate to be the owner of the stock. These methods are exclusive, and any attempt to transfer stock without delivery of the certificate does not have the effect of passing title but merely constitute a promise to transfer.

The statutes discussed above were passed by the Colo-

rado Legislature in 1927 and are set forth in the appendix to this Brief of Respondents in Opposition to Petition for Certiorari.

THE PETITION FAILS TO STATE ANY GROUND FOR CERTIORARI

The Petition for Certiorari does not set forth any of the grounds in Rule 19 of part V of the Revised Rules of this Court effective July 1, 1954, in that:

(a) The decision of the Court of Appeals is not in conflict with the decision of any other court of appeals on the same matter;

(b) The Court of Appeals did not decide an important state question in a way in conflict with applicable law;

(c) The Court of Appeals did not decide an important question of Federal law which has not been settled by this Court;

(d) The Court of Appeals did not decide a Federal question in conflict with applicable decisions of this Court;

(e) The Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings or sanctioned such departure by a lower court as to call for an exercise of this Court's power of supervision.

The Petition for Certiorari does not set forth the basis for Federal jurisdiction in the court of first instance as required by Rule 23 (1) (g) of part V of the Revised Rules of this Court effective July 1, 1954.

The Petition for Certiorari does not comply with Rule 23 (3) of part V of the Revised Rules of this Court ef-

fective July 1, 1954, in that the petition contains many references to the Petitioner's brief to the Court of Appeals which constitutes a separate brief annexed or appended to the petition in violation of said Rule.

ANSWER TO PETITIONER'S ALLEGED REASONS FOR GRANTING THE WRIT

As shown by the quotation from the opinion of the Court of Appeals, that Court based its decision upon §31-9-1 and §31-9-10, Colorado Revised Statutes 1953, which are set forth in the appendix to this Brief in Opposition to Petition for Certiorari. These statutes enacted the Uniform Stock Transfer Act.

Speaking of the Uniform Stock Transfer Act, the Ohio Court in a syllabus written by it said, at page 887 of *Knight v. Shutz*, 141 Ohio St. 267, 47 N.E. 2d 886 (1943):

> "2. The Uniform Stock Transfer Act is all inclusive and admits of no exception.
>
> • • • •
>
> "4. The title to a stock certificate and the shares represented thereby can be transferred only by delivery of the certificate properly endorsed or accompanied by a second separate document containing a written assignment or a power of attorney to assign or transfer the certificate or the shares represented thereby. . ."

Since under the Uniform Stock Transfer Act Petitioner does not have title to certificate No. 46, or to the shares represented thereby, he cannot maintain a replevin action. As is said in 46 Am. Jur. Replevin §23:

> "Replevin can be maintained only by one who has the general or special property in the thing taken or de-

tained, at the time of the commencement of the action. Such right of possession or ownership must be one by a title recognized at law, as distinguished from one recognized only in courts of equity."

The six Reasons for Granting the Writ stated on page 7 of the Petition are not supported by the authorities in that division of the petition. Such statements as reason "(3)" that "it dismiss the action in replevin on the pleadings which were admitted to be true and sufficient in statutory scope and detailed as prescribed by the legislature for petitioner's guidance and protection; * * *" are unfounded. The Petitioner seems to be arguing that a motion to dismiss for failure to state a claim upon which relief can be granted admits not only the facts which are pleaded, but also that these facts state a claim upon which relief can be granted. We will not discuss these six reasons separately but will confine ourselves to pointing out that the authorities cited in the Petition for Writ of Certiorari do not support the alleged reasons for granting the Writ.

I.

The following is an analysis of the cases and material contained in the Petition for Writ of Certiorari beginning at page 8. We feel certain that such analysis will show the inapplicability of such material to the situation at bar.

However, before doing so, may we call this Court's attention to certain of its pronouncements pertaining to the necessity of differentiating cases on their facts. In *German Alliance Insurance Company v. Home Water Supply Co.*, 226 U.S. 220, 234, 33 S. Ct. 32, 36, (1912) this is said:

"But the facts there differ from those in this record. * * * It was that question alone, as to the character of the suit and judgment, which was before this Court.

What was said in the opinion must be limited, under well known rules, to the facts and issues involved in the particular record under investigation. * * *"

Again, in *Parsons v. District Court of Columbia*, 170 U.S. 45, 51, 18 S. Ct. 521, 523 (1898):

"It is trite to say that general principles announced by courts, which are perfectly sound expressions of the law under the facts of a particular case, may be wholly inapplicable in another and different case * * *."

And in *Ogden v. Saunders*, 12 Wheat. 213, 233, 6 L. Ed. 606:

"It is a general rule, expressly recognized by the court in Strugis vs. Crowninshield, that the positive authority of a decision is coextensive only with the facts on which it is made."

The Petitioner states on page 8 of his Petition for Certiorari that his action is "closely similar" to the issue in the case of *U. S. v. Butt*, 203 F. 2d 643 (10th Cir. 1953). In that case the United States as the assignee of a note and mortgage on wheat sued the defendant for conversion of the wheat. The Court of Appeals held that a chose in action for conversion is assignable. The action was not a replevin action nor did it involve corporate stock.

The remaining cases cited by the Petitioner in paragraph 1(a) of page 8 of the Petition for Writ of Certiorari are not in point. *Tome v. Dubois*, 6 Wall. 548, 73 U.S. 548, 18 L. Ed. 943 (1866), was an action in trover for the conversion of logs. *Cook v. Ball*, 144 F. 2d 423 (7th Cir. 1944), was an action by the Superintendent of Banks of the State of Ohio as trustee for creditors of a partnership to recover the value of shares of stock claimed to have

been converted by the defendants. *Black v. Zacharie*, 3 Howard 483, 11 L. Ed. 690 (1845), involved the right of a creditor of the owner of stock to attach after the creditor had notice of an assignment of the stock for the benefits of creditors under the law of Louisiana as it existed prior to 1845. *Hatch v. Std. Oil Co.*, 100 U.S. 124, 25 L. Ed. 554 (1879), was an action of replevin by the purchaser of barrel staves against a sheriff who had attached them. The question was whether or not a delivery had been made to the purchaser such as to pass title so that creditors of the seller could not attach. *Leonard v. Davis*, 1 Black 476, 66 U.S. 222 (1861), was an action in assumpsit on a written agreement concerning the sale of logs. *Slaughter v. Glenn*, 98 U.S. 242, 25 L. Ed. 122 (1878), was an action to recover real property. The question was whether or not the wife alone could convey her real estate. *Talty v. Freedman's Trust Co.*, 93 U.S. 321, 23 L. E. 886 (1876), concerned whether or not a pledgee had authority to dispose of the pledged property. *Helvering v. Kaufmann*, 136 F. 2d 356 (4th Cir. 1943), decided that for tax purposes, as between the corporation and a stockholder, it was not necessary to deliver a certificate representing stock to a shareholder to constitute him its owner for purposes of determining the year in which a dividend in stock was made.

Paragraph 1(b) on pages 8 and 9 of the Petition for Writ of Certiorari states that when the terms of a sale are agreed upon, and the bargain struck, and everything that the seller has to do with the property is complete, the contract of sale becomes absolute between the parties without delivery. None of the cases cited for the proposition deal with the sale of stock under the stock transfer act. *Tome v. Dubois*, *supra*, was an action in trover for the conversion of logs. *Anderson v. Courtney*, 203 Okla.

71, 218 P. 2d 361 (1950), concerned the sale of a water tank. *U. S. v. San Francisco Electric Contractors Ass'n.*, 57 F. Supp. 57 (N.D. Calif. S.D. 1944), was a proceeding by the United States charging that the defendants combined to fix prices in violation of the Sherman Anti-Trust Act. *Bowles v. Jung*, 57 F. Supp. 701 S.D. (Calif. C.D. 1944), was an action to recover triple damages for price fixing on tangerines. *Pacific Co-op v. U. S.*, 91 F. Supp. 372 (Ct. Cl. 1952), was an action against the United States to recover part of the purchase price of eggs which involved a determination of the applicable OPA price. *American Surety Co. of New York v. Baker*, 172 F. 2d 689 (4th Cir. 1949), involved whether or not a claim for the conversion of hogs could be assigned. *Slaughter v. Glenn, supra*, was an action to recover real property. *Crump v. Hill*, 105 F. 2d 124 (5th Cir. 1939), was an action to recover book accounts by a trustee in bankruptcy which had allegedly been assigned without compliance with certain statutes of Mississippi. *In re Spain's Estate*, 46 NYS 2d 789 (1944), was an action to settle the accounts of an administrator, and concerned among other things, whether as between the parties a gift of stock had been made prior to the death of the deceased. *Livingston v. Powell*, 257 Ala. 38, 57 S. 2d 521 (1952), concerned whether or not a decedent had made a gift of stock certificates, government bonds and money, all of which were found in his safety deposit box after his death. The court held that the Uniform Stock Transfer Act had not been complied with and affirmed the lower court's denial of the Plaintiff's claim. *In re Millard's Estate*, 77 Pa. D. & C. 97 (1911) held that where the owner of shares, intending to make a gift thereof, executed an assignment and power of attorney to transfer shares of stock but was unable to deliver the certificate prior to his death because of his last illness, there was a valid gift between the parties. *Winslow v. Fletcher*, 53

Conn. 390, 4 A. 250 (1886), held that where stock is pledged for a debt the obligation to reconvey it is not a debt subject to garnishment but can only be reached by attaching the stock subject to the pledge. *Miller v. Hospelhorn*, 176 Md. 356, 4 A. 2d 728 (1939), indicates that constructive delivery of negotiable notes can be made to a wife by endorsing the notes in blank and leaving them in the possession of her husband for her. *Lyons v. Freshman*, 124 Mont. 485, 226 P. 2d 775 (1950), was similar to the present case but does not sustain the position of the petitioner. In that case the holder of a separate written assignment for shares of stock was unsuccessful in his attempt to obtain the stock. The court cited provisions of the Uniform Stock Transfer Act, the controlling provisions of the Montana statutes being identical with the Colorado statutes, and held that inasmuch as plaintiff's only claim was by virtue of a separate written assignment he did not have title to the stock for the reason that the Act was not complied with and that the stock certificate had not been delivered to him. *Richardson v. Commissioner of Internal Revenue*, 126 F. 2d 562 (2d Cir. 1942), held that where taxpayers instructed their agents to hold stock for the taxpayers' wives, but did not instruct the agents to transfer the stock to the wives until after passage of the gift tax, there was no completed gift until after the Act was passed. *U. S. v. Rosebush*, 45 F. Supp. 664 (E. D. Wis. 1942), involved the question whether or not under Wisconsin law a wife became a purchaser entitled to protection against a U.S. tax lien against her husband. The husband transferred stock by endorsing the certificate in blank. The certificate was found in her stock portfolio in their joint safety deposit box. Each of the parties kept a record of their stock holdings and entries were made in their individual journals relating the transfer. The subject of *Helvering v. Kaufman, supra*, is stated above.

The statements on page 10 of the Petition for Writ of Certiorari regarding the provisions of Colorado Rules of Civil Procedure 104, Replevin, are inaccurate and misleading. The operative provisions of that rule are as follows:

"(a) Personal Property. The plaintiff in an action to recover possession of personal property may, at any time before judgment, claim the delivery of such property to him as provided in this rule. (Code Sec. 85.)

"(b) Causes; Affidavit. Where a delivery is claimed, an affidavit shall be filed, showing:

(1) That the plaintiff is the owner of the property claimed, particularly describing it; or is lawfully entitled to the possession thereof;

(2) That the property is wrongfully detained by the defendant;

(3) That the same has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff; or if seized, that it is by the statute exempt from such seizure; and,

(4) The value of the property. (Code Sec. 86.)"

The remainder of the rule relates to procedural matterms and is fully set forth in the appendix to this Brief.

II.

In paragraph 2(a) on page 10 of the Petition for Writ of Certiorari the Petitioner cites the case of *Reeves v. Stokel*, 120 Colo. 82, 208 P. 2d 94 (1949). That case was an action of replevin to recover a house trailer. The Plaintiff sold the trailer to a purchaser under a conditional

sales contract which provided the purchaser could not transfer the trailer. The purchaser nevertheless transferred the trailer giving a bill of sale which recited that it was subject to a first mortgage. Although the plaintiff assigned the contract to a bank, he kept title and was obligated to pay the bank if the purchaser did not. It was held that the plaintiff had sufficient title to bring a replevin action to recover the trailer when the bank was not paid. *Gross v. Dreiling*, 127 Colo. 420, 257 P. 2d 402 (1953), was a replevin action to recover an automobile in which a seller took a note and chattel mortgage from a buyer and assigned them to a bank with recourse. It was held that the seller could maintain replevin upon the nonpayment of the buyer.

McCleod v. Fourth Nat'l Bank of St. Louis, 122 U.S. 528, 30 L. Ed. 1237 (1887), was an action against a bank which had loaned money secured by cotton. The owner of the cotton fraudulently obtained a bill of lading overstating the amount of cotton and drew a draft on the Plaintiffs who purchased the cotton. The accepted draft was sold to a bona fide purchaser and the plaintiffs were compelled to pay it. It was held that the defendant bank did not participate in and was not responsible for the fraud. The case does not contain the quotation found on page 11 of the Petition for Writ of Certiorari, nor does it mention corporate stock.

The subject of *Talty v. Freedman's Savings and Trust Co., supra*, is indicated above. *In re Rogers*, 20 F. Supp. 120 (N.D. W.Va. 1937), involved a proceeding in bankruptcy. The bankrupt was the fiduciary of the estates of decedents and also a beneficiary of these estates. He was indebted to the estates and pledged certain stocks, securities and a promissory note as security. It was held that the trustee in bankruptcy was not entitled to recover pos-

session of the pledged property but was entitled to redeem the pledge. *Miller v. Wahyou*, 235 F. 2d 612 (9th Cir. 1956), concerned the assignment of an interest of a former stockholder in a dissolved corporation. The assignment vested the assignee with sufficient interest to challenge a breach of trust on the part of the directors of the corporation.

The quotation from *Shipton v. Norrid*, 1 Colo. 404 (1872), is misleading in that it does not indicate that the sentence ends after the word "injury" where the quotation shows an omission. The rest of the quotation is in the following paragraph. The case held that fiduciaries holding legal title to a melodeon could bring replevin. The alleged quotation from *Illinois Sewing Machine Co. v. Harrison*, 43 Colo. 362, 3, 96 P. 177 (1908), which was a case concerning goods and chattels and not stock certificates, is a conglomeration of certain language found in the opinion in that case. The first sentence in the quotation paraphrases language found on page 364 of the Colorado Report, the second sentence appears on page 363 of the Colorado Report.

The cases cited on page 12 of the Petition for Writ of Certiorari deal with the following matters. *Hahauer v. Bartels*, 2 Colo. 514 (1875), concerned a sale of flour and whether or not title passed when delivered to a common carrier. *Benesch v. Waggoner*, 12 Colo. 534, 21 P. 706 (1889), involved bales of tobacco. *Webster v. Kautz*, 22 Colo. App. 111, 123 P. 139 (1912), was an action to quiet title to land. It indicated that the plaintiff in a quiet title action is not required to show an indefeasible title. *St. Aubin v. Marshall Field Co.*, 27 Colo. 414, 62 P. 199 (1900), was a replevin action to recover a stock of goods. A vender transferred two stocks of goods to a vendee, the vendee entering into possession. A tripartite agreement

was entered between the vendor, vendee and a creditor of the vendor by which both stocks were to be transferred to the vendor and by the vendor to the creditor. The bill of sale to the vendor contained both stocks but the one to the creditor contained only one. It was held that the creditor could maintain replevin for the other stock since he claimed them under the tripartite agreement. *Clay v. Martinez*, 74 Colo. 10, 218 P. 903 (1923), involved a bailment of sheep which had been improperly mortgaged by the bailee. *Harrison v. City and County of Denver*, 102 Colo. 98, 76 P. 2d 110 (1938), was a suit to remove a cloud on title to real property existing by reason of a tax deed thereto. The subjects of *Reeves v. Stokel, supra, Gross v. Dreiling, supra, In re Rogers, supra, U. S. v. Rosebush, supra*, and *McLeod v. Fourth National Bank of St. Louis, supra*, have previously been indicated. The *Somerville* case cited as 119 N.E. undoubtedly refers to the case of *Somerville National Bank v. Hornblower*, 393 Mass. 363, 199 N.E. 918 (1936). In that case a bank delivered certificates representing shares of stock to a broker by mistake and the broker transferred them to others. It was held that the broker was liable for conversion. *Williams v. Williams*, 274 P. 2d 359 (Okla. 1954), was an action by a father to replevin an automobile allegedly sold to him by his son but in the possession of the son's ex-wife. It was held that refusal to grant the ex-wife's motion to make more definite and certain the manner in which the plaintiff became the owner of the car was not abuse of discretion. *Baron v. Peoples National Bank of Secaucus*, 15 N.J. Super. 243, 84 A. 2d 492, (1951), was a replevin action by the pledgor of stock against the pledgee. It did not involve a transfer of the interest of the pledgor in the stock without a transfer of the certificate. *Journeymen Barbers v. Pollino*, 39 N.J. Super. 250, 120 A. 2d 767 (1956), was a labor union action to replevin "union shop cards" is-

sued to barbershop operators. Restatement-Trusts, §2. Comment (d), Title and Ownership, merely points out that for purposes of the restatement of the law of trust the term "owner" is used to indicate a person in whom one or more interests are vested for his own benefit. Under the restatement the term "title" does not indicate whether the holder holds property for his own benefit or as trustee.

The case of *Blackmer v. Blackmer*, 87 Colo. 483, 289 P. 366 (1930); did not involve an assignment of shares of stock without a delivery of the certificate. *Denver Onyx & Marble Manufacturing Co. v. Reynolds*, 72 F. 464 (10 Cir. 1895), was an action to recover possession of blocks of Arizona onyx. The quotation from *Baron v. Peoples National Bank of Secaucus, supra*, is taken from 46 Am. Jur. Replevin §22. This section is the last section under subpart b. "Particular Property" under part II. "Property Which Can Be Replevined." It points out that replevin may be maintained to recover the specific paper on which the certificate is printed. The section does not deal with the title or right to possession of the plaintiff in a replevin action which is contained in part III "Title or Right to Possession" beginning at §23 of 46 Am. Jur. Replevin.

11 *Fletcher, Cyclopedia of Corporation*, Par. 5097, merely points out that shares of stock are incorporeal and intangible property, existing only in abstract legal contemplation. The quotation therefrom on page 13 of the Petition does not appear in the 1958 Revised Edition.

III.

We are unable to find in any statute in the State of Colorado, either in the corporation laws thereof or the larceny provisions, any statements justifying the conten-

tions advanced by petitioner on page 13 of his brief as contained in the first paragraph of the third subdivision.

We think it to be axiomatic, from an examination of the statute, supra, that which ever petitioner claims; i.e., either the certificate itself or the shares represented thereby, that title thereto can only be vested in him in one of two methods: (1) By an endorsement and delivery of the certificate (this admittedly did not happen) or (2) By a delivery of the certificate and a separate document. Admittedly this did not happen. The existence of the separate document, Exhibit "E", (R. 22) must be conceded.

The inapplicability of *Stearns v. U. S.*, 291 U.S. 54, 61, 78 L. Ed. 647 (1934), page 14 of Petitioner's brief, is clearly apparent. There, the question of waivers deferring time for collecting taxes was involved. In addition the petitioner filed a request with the Commissioner to withhold the process of collection until credits were adjusted.

It is clearly apparent from an examination of the *Stearns* case that the attempted collection, which Stearns Company was complaining of in the proceedings involved, had been postponed at their request. An entirely different situation from the one at bar was presented. Here respondents had nothing to do with the execution of the assignment which petitioner relies upon. Its insufficiency, measured against the requirements of the statute, to either transfer title to the physical certificate claimed or to the shares of stock represented thereby in accordance with statutory law, is not the act of any of the respondents.

Mullane v. Central Hanover Bank and Trust Company, 70 S. Ct. 652, 339 U.S. 306 (1950), questioned the constitutional sufficiency of notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking Law.

The opinion discussed the ineffectiveness, under certain circumstances, of notice by publication, and reversed the decision of the New York Court of Appeals for the reason that the facts disclosed did not meet the requirements of the Fourteenth Amendment.

In the *Woods v. Klobuchar*, 257 F. 2d 313 (7th Cir. 1958), the question was:

> "Was the plaintiff — appellant's action in the Federal Court under Section 1332, United States Code, title 28, governed by the six (6) months time limit, for filing claims in the court administering the decedent's estate.
>
> Our answer must be in the affirmative."

"Section 2-403 reads, in applicable part, as follows:

> 'All causes of action shall survive, and may be brought, notwithstanding the death of the person * * * liable to such action, * * * against the representative of the deceased party, * * * in event the action be brought subsequent to the death of the party against whom the cause existed, *then the same shall be prosecuted as other claims against said decedent's estate.*' "

The Court said, page 315, following the excerpt from such case quoted by appellant:

> "* * * Thus when paragraph 2-403, without which plaintiff's action would have died with David Klobuchar, was enacted it gave a new and theretofore unknown right and specifically provided the only method by and the time within which that right could be enforced. A Federal Court could not entertain this suit * * * when the identical action could not at that same time have been brought in an Indiana State Court be-

cause it was barred by the Statute of Limitations controlling therein."

Had this action been brought in a State Court of Colorado and noncompliance with the provisions of Section 31-9-1, supra, been called to the attention of the Court, the ruling, we believe, of the Colorado Court would have been the same as were the rulings and decisions of the lower Federal Courts where the matter was considered.

In considering the case of *U. S. v. Am. Nat. Bank of Jacksonville*, 255 F. 2d 504, 506 (1958), (this case is a Fifth Circuit case and not an Eighth Circuit) the language appearing therein and referred to on page 15 of the brief, it must be kept in mind that two matters were before the Court. The first was whether or not a federal tax lien attached to property held by entireties. The Court held that it did not and based its conclusion upon Florida decisions. The second matter for consideration was whether certain indebtedness of one of the tenants by entirety attached and was covered by a mortgage. The Court held that under the factual situation disclosed the "dragnet" provision in the mortgage did not apply and that the indebtedness sought to be included thereunder was not covered.

No factual similarity to the case at bar is disclosed.

The inapplicability of *Harris v. Egger*, 226 F. 389, 395 (6th Cir. 1915), page 15 of Petitioner's brief, is apparent from the opinion rather than the giving and drawing of interpretations as to the meaning of the language actually used.

On page 395 of the opinion the Court says this:

"It should be added that by statute of Tennessee it is provided: 'The stocks in all private corporations

are personal property, and subject to levy and sale as such, the company in such case being required to make the proper entries in its stock or transfer book • • •"

"This statutory rule will be recognized, and where necessary enforced, by the Federal Courts. (Citing cases) *It is well settled in Tennessee* that the title to stock passes and becomes complete in the purchaser upon the assignment of the certificate, without registration or transfer on the stock book of the corporation (citing cases)." (emphasis added)

We think it is obvious from the decision in *Harris v. Egger, supra*, that the Court was not passing upon a Tennessee Statute such as the one involved here. This decision was in 1915. Martindale shows that Tennessee adopted the Uniform Stock Transfer Act in 1925.

In passing we would like to say that we can find nothing in the decision of *Harris v. Egger, supra*, justifying the language appearing on page 15 of the brief after the word "citations".

Olan vs. Enterprise Publishing Company, 210 F. 2d 895 (5th Cir. 1954), cited by petitioner on page 16 of his petition discloses an utter lack of similarity to the case at bar. For the convenience of the Court we quote from page 896 of the opinion:

"Olan Mills, Inc., • • • a foreign corporation engaged in the photography business, was doing business in Louisiana and was planning to canvass the Bogalusa trade area. The local photographers, • • • three in number, objected to the entry of Olan Mills into this area. In the interest of harmony, a meeting was held in the office of the Mayor of Bogalusa on Thursday, June 5, 1952. At this meeting, the alleged defamatory

remarks were orally made by the two individual defendants. The next morning, the defendant Enterprise Publishing Company printed and published said defamatory utterances. In its complaint, the appellant set forth the facts constituting said libel and slander, its business reputation, and the deliberate intention of appellees to injure plaintiff. It failed to allege malice."

"Defendants White and Mornhinveg filed motion to dismiss the complaint for lack of jurisdiction, misjoinder of parties, and failure to state a claim upon which relief could be granted. The Enterprise Publishing Company raised the same objections, and, in addition, urged that its communications were privileged. After consideration of the matter upon briefs and oral argument, the court dismissed the complaint for failure to state a claim upon which relief could be granted."

The Circuit Court in a part of its opinion, which we believe might be said to be dicta, approved the District Court's not having sustained the motion to dismiss for lack of federal jurisdiction and misjoinder of parties. It further approved the action of the lower Court in dismissing the complaint as to the individual defendant Mornhinveg.

Syllabii five and six are devoted to a consideration of the proceedings as they apply to the appellee White. However, since petitioner seems to have excerpted the language appearing in syllabus eight relative to the Enterprise Publishing Company we quote:

"As to the Enterprise Publishing Company, its claim of privilege cannot be availed of by a motion to dismiss; it must be pleaded by answer, since pleas are

abolished under the Federal Rules of Civil Procedure. There may be an issue for the jury on this subject together with other issues. If the company had a qualified privilege, it may have gone beyond the scope of such defense. Such matters belong to a trial on the merits before the court and a jury, not to a motion to dismiss which admits so much (citing cases)."

Stanton v. Larsh, 239 F. 2d 104, 106 (5th Cir. 1956), page 16 of the petition was an action for damages for wrongful discharge. The District Court granted defendant's motion for judgment on the pleadings. The Court said at page 106:

"* * * In other words, a judgment on the pleadings alone, if sustained, must be based on the undisputed facts appearing in all the pleadings. * * *"

The motion dismissing the complaint below was predicated solely upon the fact that it appeared undisputed from the pleadings that petitioner, plaintiff below, had not complied with the mandatory and indispensable requirements of 31-9-1, supra.

Dotschay v. National Mutual Insurance Company of the District of Columbia, 246 F. 2d 221 (5th Cir. 1957) was an action for the alleged breach of duty of a liability insurer to compromise a claim.

Ryan v. Scoggin, 245 F. 2d 54, 57 (10th Cir. 1957) (erroneously cited as 246 F. 2d) was an action against a judge to recover damages for committing the daughter of the parties to a divorce action to a hospital. It is perfectly true that language of the general import attributed thereto by petitioner is to be found in the report of the case. However, in the same paragraph appears this language:

* * *

"But such a motion does not admit unwarranted inferences drawn from the facts or footless conclusions of law predicated upon them. • • •"

The facts in the present instance were and are that Petitioner admittedly received an assignment in the form attached to the Third Amended Complaint, Exhibit "E" (R. 22).

His "unwarranted inferences" and "footless conclusions of law" to the effect that compliance with the provisions of the statute was unnecessary do not and did not entitle him to a reversal in the Circuit Court or to consideration in this Court.

The dismissal was affirmed in the Ryan case.

Carass v. Outboard Marine Corporation, 252 F. 2d 430 (5th Cir. 1958), was a suit to recover for injuries sustained by a professional model when thrown from an outboard driven boat. The Circuit Court held that the complaint, which had been dismissed, was broad enough to let in various sorts of evidence which might have enabled the plaintiff to recover upon a trial. This, we believe, is far removed from the instant proceedings where it stands undisputedly admitted that the plaintiff had not complied with the provisions of Section 31-9-1, supra. If such proof was unavailable under any theory, no harm can have resulted in the dismissal of the action in limine instead of doing so after time which the congested docket of the District Court could ill afford.

An examination of the other federal cases, *Polk v. Glover*, 305 U.S. 5, 6 (15-16), 83 L. Ed. 6 (1938); *Dietrich v. Greaney*, 309 U.S. 190, 6, 84 L. Ed. 694 (1939); *Hardware Mutual Insurance Company v. Snyder*, 137 F. Supp. 812 (W.D. Penn. 1956), cited on page 16 of petitioner's application, discloses nothing in the facts considered there-

in in anywise militating against the judgment entered below. We will not prolong this by a detailed reference to them.

We are unable to determine from *Fardy v. Mayerstein*, 221 Ind. 339, 47 N.E. 2d 315, 317, (1943) the applicability of the particular quotation. The last sentence of such opinion, page 319, could be paraphrased, we believe, to read this way:

> "Appellant Brennan, choosing to reply upon the status of stockholder and having the burden of proving the allegations of his petition, undertook to show that he became such a purchaser at public sale, and failed in his proof."

In the instant proceeding Brennan, by his pleadings, conclusively established that the precedent conditions; endorsement on the certificate or assignment by separate instrument coupled with delivery of the certificate, as required by law, were not complied with and consequently ownership neither as to the certificate nor as to the shares of stock represented thereby vested in him.

We feel that Petitioner's remarks following the quotation from the *Fardy* case appearing on page 17 are unjustified, not borne out by the record and do not in anywise truthfully represent the factual situation presented here. To contend that certificate of stock number 46 was the subject matter of the action is but a play on words. An examination of the Third Amended Complaint clearly shows that what plaintiff had had purportedly assigned to him was the 50 shares of stock represented by the certificate. Nothing in the record discloses, to our knowledge, that the District Court had denied petitioner's motion under the discovery process; nothing in the record shows any attempted compliance with that part of Rule 21 which

provides that: "Parties may be dropped or added by order of the Court on Motion of any party or of its own initiative at any stage of the action and on such terms as are just." In other words by the Third Amended Complaint Petitioner named two additional corporations as defendants and in nowise made an effort to obtain an order of Court authorizing him so to do. Under such circumstances he is not in a position to complain of the fact that the Clerk of the District Court declined to issue summons.

Societe Internationale v. Rogers, 357 U. S. 197, 2 L. Ed. 2nd 255, 78 S. Ct. 1087 (1958), was an action in which a proceeding had been dismissed for failure to comply with a production order. This Court with clarity and detail set forth circumstances appearing below. In the present instance the failure to observe the requirements of statute, 31-9-1, supra, were clearly apparent. The legal effect of such failure was purely a question of law for the Court.

In the *Blackmer* case, 87 Colo. 483, 484, 289 Pac. 366 (1930), the Supreme Court of Colorado held a demurrer should have been sustained because the stock certificate sought to be returned was not alleged to be in the possession of the defendant. Nothing in the case in anywise militates against the contention of respondents in the present case that under the allegations of the complaint plaintiff had completely shown his lack of ownership of or right to possession of either the certificate in question or the stock represented thereby. In other words, petitioner pleaded himself out of Court.

Denver Onyx and Marble Mfg. v. Reynolds, 72 F. 464 (10th Cir. 1895), which was an action to recover blocks of Arizona onyx, again, we believe, but strengthens our contention that had petitioner contented himself with simply

having pleaded what various Colorado cases say is sufficient he unquestionably, until proof to the contrary was introduced, would have found himself situated differently than he now does.

CONCLUSION

We respectfully submit that the Writ should be denied for the reasons that the Petition for Certiorari (1) does not set forth any grounds in Rule 19 of part V of the Revised Rules of this Court, (2) does not comply with Rule 23 of part V of the Revised Rules of this Court, and (3) does not cite authority upon which a reversal could be predicated.

GORSUCH, KIRGIS, CAMPBELL, WALKER AND GROVER
By CHARLES E. GROVER
222 Equitable Building
Denver 2, Colorado
Attorneys for Respondent

Of Counsel:
JACK F. SEAVY
Thatcher Building
Pueblo, Colorado

May, 1959

APPENDIX

Colorado Revised Statutes (1953) § 31-9-1

Transfer of Title to Certificates and Shares. Title to certificates and to the shares represented thereby can be transferred only:

(1) By delivery of the certificate endorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

(2) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or bylaws of the corporation issuing the certificate and the certificate itself provide that the shares represented thereby shall be transferrable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent.

Source: L. 27, p. 265, § 1; CSA, C. 41, § 87.

Colorado Revised Statutes (1953) § 31-9-10

An Ineffectual Attempt to Transfer Amounts to Promise to Transfer. An attempted transfer of title to a certificate or to the shares represented thereby without delivery of the certificate shall have the effect of a promise to transfer and the obligation, if any, imposed by such

promise, shall be determined by the law governing the formation and performance of contracts.

Source: L. 27, p. 270, § 10; CSA, C. 41, § 96.

The following is the portion of Colorado Rule of Civil Procedure 104, "replevin", not set forth in the text of this brief.

"(c) *Bond: Writ.* The plaintiff shall file a written undertaking executed by two or more sufficient sureties or a corporate surety company, approved by the clerk, to the effect that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the action without delay, and with effect, and for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff. The clerk shall thereupon issue a writ requiring the sheriff to forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody until delivery as hereinafter provided. The sheriff shall also, without delay, serve on the defendant a copy of the writ, by delivering to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual abode of the defendant with some member of his family over the age of 18 years; or, if he has no place of abode, by putting said copy in the nearest postoffice, directed to the defendant. (Code Sec. 87.)

"(d) *Exception to Sureties. Liability of Clerk.* The defendant may, within 5 days after the service of a copy of a writ, give notice to the clerk that he excepts to the sufficiency of the sureties on plaintiff's undertaking. If he fails to do so within 5 days after such service, he shall

be deemed to have waived all objections to them. When the defendant excepts, the sureties shall justify, on notice, before the clerk within 5 days after such notice, and if they fail to justify in said time, the property shall be returned by the sheriff to the defendant. The clerk shall be responsible for the sufficiency of the sureties until the objection to them is waived, as above provided, or until they justify. If the defendant excepts to the sureties, he cannot reclaim the property as provided in this rule. (Code Sec. 88.)

"(e) *When Returned to Defendant. Bond.* At any time, within 48 hours from the time of the taking of the property and the service of the writ, the defendant may, if he does not except to the sureties of the plaintiff, require the return of the property, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, or a corporate surety company, who shall justify before such undertaking shall be accepted or approved, to the effect that they are bound to the plaintiff in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. If a return of the property be not so required in such time, it shall be delivered to the plaintiff, except as provided in this rule. (From Code Sec. 89.)

"(f) *Qualification of Sureties. New Bond.* The qualification of sureties and their justification shall be such as are prescribed for sureties on attachment bonds or undertakings. If, at any time, on notice, it shall appear to the court that any undertaking given is insufficient or that any surety therein has died or has removed from this state, or is or has been or is likely to become insolvent, said court shall order another and satisfactory undertaking to be

given within such time as the court shall direct. If any person to whom such order shall be directed shall fail to comply with the terms thereof the court shall order the return of the property to the adverse party pending the trial. (From Code Sec. 90.)

"(g) *Amended or Additional Bonds.* The court shall allow upon such terms, and within such time as may be just, the giving of amended or additional undertakings or affidavits in place of defective or insufficient ones. (Code Sec. 91.)

"(h) *Sheriff May Break Buildings, When.* If the property, or any part thereof, be concealed in a building or inclosure, the sheriff shall publicly demand its delivery; if it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and if necessary, he may call to his aid the power of his country. (Code Sec. 92.)

"(i) *Duty of Sheriff in Holding Goods.* When the sheriff shall have taken property, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same. (Code Sec. 93.)

"(j) *Claim by Third Person. Indemnity to Sheriff.* If the property taken be claimed by any other person than the defendant, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand, indemnify the sheriff against such claim by an undertaking of a corporate surety company, or with two sufficient sureties, each one qualifying as worth double the value of the property as specified in the affidavit of the

plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution; and no claim to such property by any other person than the defendant shall be valid against the sheriff unless so made. (From Code Sec. 94.)

"(k) *Custodian of Property. Bond.* If the property taken be of extraordinary kind, or of uncertain value, any claimant thereof may apply to the court upon due notice and thereupon the court, after a hearing upon affidavits or otherwise, may direct in whose custody the property shall be kept pending the litigation, and may require the custodian to give bond with sufficient surety for the forthcoming of the property to abide the further order of the court. (From Code Sec. 95.)

"(l) *When Sheriff Files Papers.* The sheriff shall file the notice and all undertakings and affidavits with his proceedings thereon, with the clerk within 20 days after taking the property mentioned thereon. (From Code Sec. 96.)

"(m) *Judgment.* In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same. The provisions of Rule 13 shall apply to replevin actions. (Supplants Code Sec. 247.)"

Supreme Court of the United States

October Term 1959

No. 361

JOSEPH M. BRENNAN

v.

W. A. WELLS, LTD., W. A. WELLS HERMAN SHEET, WILLIAM GREENBERG, HERBERT E. ROBISON, SEEKEL WRECKING CO., ROCK WOOL INSULATING COMPANY, [illegible] INVESTMENT COMPANY, [illegible]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

Subject Index

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes, Rules and Regulations Involved	4
Statement	5
Reasons for Granting the Writ	7
Conclusion	18
Appendix—Includes Transcript of Record of the District Court, folios 78 to 133, pages 1 to 41; Transcript of Record of the Court of Appeals, pages 1 to 18; and, Petitioner's Brief to the Court of Appeals, pages 1 to 33	19

Cases Cited

Am. Surety Co. v. Baker, 4 Cir. 1, 172 F. 2d 689, 92	9
Anderson v. Courtney, 1950, 218 P. 2d 361, 4	9
Baron v. Peoples Nat. Bk. of Secaucus, 84 A. 2d 492, 3	12
Benesch v. Waggoner, 12 Colo. 534, 21 P. 706	12
Black v. Zacharie, 1845, 11 L. Ed. (3 How.) 690	8
Blackner v. Blackner, 87 Colo. 483, 289 P. 366, 7	12
Bowles v. Jung, 57 F. S. 701, 7	9
Carass v. Outboard Marine Corp., 1958, 5 Cir., 252 F. 2d 690	16
Clay v. Martinez, 74 Colo. 10, 13, 218 P. 903	12
Cook v. Ball, 7 Cir., 144 F. 2d 423, 429	8
Crump v. Hill, 105 F. 2d 124, 6	9
Denver Onyx Co. v. Reynolds, 1895, 10 Cir., 72 F. 464	12, 18
Dietrick v. Greany, 309 U. S. 190, 6, 84 L. Ed. 694	16
Dotschay v. Nat. Mut. Ins. Co., 1957, 5 Cir., 246 F. 2d	

Page

221, 3 16
Fardy v. Mayerstein, 47 N. E. 2d 315 16
Gross v. Dreiling, 127 Colo. 420, 257 P. 2d 402, 3 ..... 11, 12
Hanauver v. Bartels, 2 Colo. 514, 23 12
Hardware Mut. Ins. Co. v. Snyder, 3 Cir., 137 F. S. 812, 3 16
Harris v. Egger, 1915, 6 Cir., 226 F. 389, 95 15
Harrison v. City of Denver, 102 Colo. 98, 103, 76 P. 2d 110, 12 12
Hatch v. Std. Oil Co., 1879, 100 U. S. 124, 31, 25 L. Ed. (10 Otto) 554, 5 8
Helvering, Comr. I. R. v. Kaufman, 4 Cir., 136 F. 2d 356, 8 ..... 8, 9
Illinois Sew. Mach. Co. v. Harrison, 43 Colo. 362, 3, 96 P. 177 11
In re Millard's Estate, 77 Pa. D & S 97 9
In re Rogers, 20 F. S. 132 ..... 11, 12
In re Spain's Estate, 46 N. Y. S. 2d 789, 91 9
Journeymen Barbers v. Pollino, 120 A. 2d 767, 73 12
Leonard v. Davis, 1861, 17 L. Ed. (1 Black) 222, 5 8
Livingston v. Powell, 50 So. 2d 521, 5 9
Lyons v. Freshman, 226 P. 2d 775, 7 9
McLeod v. Fourth Nat. Bk. of St. Louis, 122 U. S. 528, 33, 30 L. Ed. 1237 ..... 11, 12
Miller v. Hospelhorn, 4 A. 2d 728, 33 9
Miller v. Wahyou, 1956, 9 Cir., 235 F. 2d 612, 5 11
Mullane v. Cent. Hanover Tr. Co., 339 U. S. 306, 14 15
Olan v. Enterprise, 1954, 5 Cir., 210 F. 2d 895, 7 16
Pac. Coop. v. U. S., 91 F. S. 572, 3 9
Polk v. Glover, 305 U. S. 5, 6, 83 L. Ed. 6 16
Reeves v. Stokel, 1949, 120 Colo. 82, 208 P. 2d 94 ..... 10, 12
Richardson v. Int. Rev., 126 F. 2d 562 9
Ryan v. Scoggin, 1957, 10 Cir., 245 F. 2d 54, 6 16
Shipton v. Norrid, 1872, 1 Colo. 404 11

Page

Slaughter v. Glenn, 1878, 98 U. S. 242, 5, 25 L. Ed. 122, 3 ..... 8, 9
Societe Internationale v. Rogers, 1958, 357 U. S. 197, 2 L. Ed. 2d 1255, 65, 78 S. Ct. 1087 17
Somerville Bk. v. Hornblower, 1936, Mass., 119 N. E. 918 12
St. Aubin v. Marshall Field Co., 27 Colo. 414, 62 P. 199, 201 12
Stanton v. Larsh, 1956, 5 Cir. 239 F. 2d 104, 6 16
Stearns v. U. S., 291 U. S. 54, 61, 78 L. Ed. 647, 53 14
Talty v. Freedmans Trust Co., 1876, 93 U. S. 321, 23 L. Ed. 886, 7 ..... 8, 11
Tome v. Dubois, 1866, 6 Wall. 548, 73 U. S. 548, 18 L. Ed. 943 ..... 8, 9
U. S. v. Am. Nat. Bk. of Jacksonville, 1958, 8 Cir., 255 F. 2d 504, 6 15
U. S. v. Butt, 1953, 10 Cir., 203 F. 2d 643 8
U. S. v. Rosebush, 45 F. S. 664 ..... 9, 12
U. S. v. S. F. Elec. Ass'n., 57 F. S. 57, 67 9
Webster v. Kautz, 22 Colo. App. 111, 17, 123 P. 139 12
Williams v. Williams, 274 P. 2d 359, 62 12
Winslow v. Fletcher, 4 A. 250, 5 9
Woods v. Klobuchar, 1958, 7 Cir., 257 F. 2d 313, 5 15

Statutes and Rules Cited

Colorado Rev. Stats. Chap. 31, Art. 2, Secs. 8 & 14 ..... 4, 10
Colorado Rev. Stats. Chap. 31, Art. 9, Secs. 1 to 9 ..... 4, 10
Colorado Rules of Civil Procedure, Rule 104-Replevin 4, 10, 13
Federal Rules of Civil Procedure, Rule 9 5
Federal Rules of Civil Procedure, Rule 12 ..... 5, 16
Federal Rules of Civil Procedure, Rule 19(b) 5, 17
Federal Rules of Civil Procedure, Rule 33 ..... 5, 17
Federal Rules of Civil Procedure, Rule 34 ..... 5, 17

Page

Federal Rules of Civil Procedure, Rule 35 5
Federal Rules of Civil Procedure, Rule 38 ..... 5, 17
Rules of the Supreme Court of the United States, Rules 19, 21, and 23 5
Title 28 U. S. C. A., Secs. 1652 & 1254 (1) 2, 4

Miscellaneous Citations

42 A. L. R. 128 8
140 A. L. R. 705 9
4 Am. Jur. Assignments, Sec. 34, page 255 8
41 Am. Jur. Pledge and Collateral Security, Secs. 90 & 93 16
46 Am. Jur. Sec. 22, page 15 13
6 C. J. S. Assignments, Sec. 34 8
11 Fletcher, Cyclopedia of Corporations (Perm. Ed.) Sec. 5097, page 62; (Rev. Vol. 1958), Sec. 5097, page 109 13
Burns Anno. Stats., Secs. 27-701 et seq., Vol. 6-Uniform Laws Annotated 17
Restatement-Trusts, Sec. 2, Comment (d), Title and Ownership defined 12

Supreme Court of the United States

October Term 1959

No. ——

JOSEPH M. BRENNAN,

Petitioner,

vs.

W. A. WILLS, LTD.; W. A. WILLS; HERMAN SPEKEN; WILLIAM GREENBERG; HERBERT F. KORHOLZ; SPEKEN WRECKING CO.; ROCK WOOL INSULATING COMPANY, a Colorado Corporation; and M. P. M. INVESTMENT COMPANY, a Delaware Corporation,

Repondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on January 5, 1959.

OPINIONS BELOW

The opinion of the District Court for the District of Colorado is reported in the Transcript of Record to the Court of Appeals (Fols. 116 & 126, pp. 29, 30, 38 & 39),

and a certified copy thereof is appended to this petition. The opinion of the Court of Appeals for the Tenth Circuit is reported at 263 F. 2d 1.

(The Exhibits, folios and pages referred to in the Transcript of Record from the District Court are indicated as: TR., Ex. ". . ", fol. . . , pp. . . References to the Transcript from the Court of Appeals are indicated as: R. CCA, pp. . .. References to Petitioner's Brief to the Court of Appeals are indicated as: R. CCA-Brief, pp. . .)

JURISDICTION

The judgment of the Court of Appeals was made and entered on January 5, 1959 (R. pp. 3-13), and a certified copy thereof is appended to this petition. Denial of petition for rehearing was made and entered by the Court of Appeals on February 6, 1959 (R. p. 17). The jurisdiction of this Court is invoked under Title 28 USC 1254(1) and Rule 21 of Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

Introductory statement: All right, title and interest in and to Certificate of Stock No. 46 in Rock Wool Insulating Company, a Colorado corporation, was sold, assigned and transferred to petitioner by an instrument in writing as duly executed by and delivered to petitioner by the registered owner of Certificate of Stock No. 46. The transaction was consummated without delivery of Certificate of Stock No. 46, as delivery of said certificate was made impossible by respondents' retention thereof and refusal to surrender same and refusal to accept tender to release said certificate from its pledged status.

Petitioner's Replevin action was filed in the District

Court on September 19, 1954, the complaint was amended three times incident to a series of motions as filed by respondents. The Third Amended Complaint was dismissed on the pleadings by the District Court on October 31, 1957, and its judgment rendered and entered was: "That plaintiff had no title to the certificate of stock which he seeks to replevin * * * and fails to show a compliance with the statutes of the State of Colorado necessary to transfer title to a certificate of stock and to the shares represented thereby from the record owner of said stock certificate to plaintiff." (TR. fol. 116, p. 29). The Court of Appeals affirmed. The questions presented are:

1(a) Whether petitioner acquired all right, title and interest in and to Certificate of Stock No. 46 in Rock Wool Insulating Company, when its registered owner delivered to petitioner a duly executed instrument of sale, assignment and transfer of all right, title and interest in and to Certificate of Stock No. 46 in consummation of the transaction, and when manual delivery of Certificate of Stock No. 46 was made impossible of delivery to petitioner, by respondents' retention thereof, refusal of its surrender and refusal to accept tender to release it from its pledged status.

(b) Whether said transaction by and between petitioner and the registered owner of Certificate of Stock No. 46 constituted an executed contract for the sale, assignment and transfer of all right, title and interest in and to said Certificate, or, as the Court of Appeals ruled, that it merely constituted a promise to transfer the stock.

2(a) Whether petitioner was denied his right of a trial before a jury on the merits of his action in replevin, when he pleaded in accordance with the applicable statute, viz. his ownership of Certificate of Stock No. 46, his

right to its immediate possession, and its wrongful retention by respondents, which allegations were admitted to be true when the action was dismissed on the pleadings, and wherein a question of ultimate fact was involved and not one of law.

(b) Whether the District Court and the Court of Appeals were required to be governed by statutory law of the State of Colorado, as prescribed by C.R.C.P., Rule 104-Replevin, and the decisions of the Supreme Court of the State of Colorado construing said statute and Rule 104.

(c) Whether legal title to the intangible corporate stock evidenced by Certificate of Stock No. 46, was an issue in petitioner's replevin action, when recovery of the personal property, viz, Certificate of Stock No. 46, the muniment or evidence of ownership was the personal property sought to be recovered in petitioner's replevin action.

3. Whether the dismissal of petitioner's action in replevin under the circumstances stated in questions 2(a), (b), (c) above, by the District Court and the affirmance thereof by the Court of Appeals has so far departed from the usual and accepted course of judicial procedure as to call for an exercise of this court's power of supervision.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

The pertinent portions of the Revised Statutes of the State of Colorado are set forth in petitioner's Brief to the Court of Appeals appended hereto on the referenced pages: Chap. 31, Art 2, Secs. 8 and 14 at page 9; Chap. 31, Art. 2, Secs. 1, 3, 4, 5 and 6 at pages 10-11; Colorado Rules of Civil Procedure, Rule 104 at pages 6-7; Title 28 U. S. C. A.,

Secs. 1652 and 1254 (1) and Rules 19, 21 and 23 of the Supreme Court of the United States. F. R. C. P., Rules 9, 12, 19(b), 33, 34, 35 and 38.

STATEMENT

Earl Melia was the registered owner of Certificate of Stock No. 46 representing ownership of fifty shares of Capital Stock in Rock Wool Insulating Company, a Colorado Corporation (TR. Ex. "A", fol. 106, p. 21). In September 1952, Melia obtained a loan of $1,200.00 from W. A. Wills, Ltd., which involved a loan contract between Melia and Wills, Ltd.; Melia's promissory note of $1,200.00 to Wills, Ltd., at an interest rate of six per cent per month; and, Melia's pledging with Wills, Ltd. Certificate of Stock No. 46 as security for said loan (TR. Exs. "B" & "C", fol. 106, pp. 21-22). Subsequently, respondent W. A. Wills, Ltd. in concert with the other respondents carried on a series of secret manipulations affecting said loan contract, promissory note and the pledged Certificate of Stock No. 46 without any knowledge thereof by Melia, eventually respondent Speken told Melia, that he had Certificate of Stock No. 46 in his office safe and that he would carry said loan indefinitely at eight per cent per annum, and which interest rate Speken later on affirmatively stated was at six per cent per annum. However, Melia paid all interest on said loan to Speken currently at eight per cent per annum (TR. Ex. "D", fol. 106, p. 22).

On August 13, 1954, Melia sold, assigned and transferred all right, title and interest in and to Certificate of Stock No. 46 to petitioner (TR. Ex. "E", fol. 107, pp. 22-23), and of said transaction by and between Melia and petitioner, each of the respondents were duly and promptly notified by petitioner's registered letter (TR. Ex. "F", fol. 108, pp.

24, 25). Respondents at all times refused to accept tender of repayment of said loan and refused all demands for the return of Certificate of Stock No. 46 to either said Melia or petitioner (TR., fols. 100 to 103, pp. 16-18).

On September 19, 1954, petitioner filed his complaint in replevin in the District Court naming each of respondents as defendants, except Rock Wool Insulating Company and M. P. M. Investment Co. Subsequently, an amended complaint was filed which specified the amount involved, and the damages and compensation prayed for in the event Certificate of Stock No. 46 was not delivered into petitioner's possession, and respondents' motion to dismiss the amended complaint was overruled and respondents filed their answer thereto. A second amended complaint was filed without any material change in the pleadings, except an expansion of the allegations of fraud so as to conform to the particularity required by F.R.C.P., Rule 9. A subsequent motion of respondents to dismiss for failure to state a cause of action was sustained, and the court on its own motion granted petitioner leave to file a third amended complaint to include additional party defendants, and the third amended complaint as filed added Rock Wool Insulating Company and M. P. M. Investment Co. as additional defendants (TR. fol. 94, p. 11). Respondents' motion to dismiss the Third Amended Complaint (TR. fol. 109, p. 26) was sustained, and judgment rendered and entered without acting on petitioner's Motion for Order to Issue Summons for service on additional party defendants (TR. fol. 113, p. 27). Subsequent proceedings in the District Court were confused and irregular (TR. fols. 113 to 126, pp. 27 to 39).

The judgment of the District Court (TR. fols. 116 & 126, pp. 29 & 38) as rendered and entered, was in pertinent

part: "That plaintiff has no title to the certificate of stock he seeks to replevin in that the Third Amended Complaint fails to show a compliance with the statutes of the State of Colorado necessary to transfer title to a certificate of stock and to the shares represented thereby from the record owner of said stock certificate to the plaintiff." The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

The decision below should be reversed for the reasons: (1) It erroneously interprets and misapplies the legislative intent and purpose of the pertinent statutes of the State of Colorado, and the decisions of the Supreme Court of the State of Colorado construing the provisions of those statutes; (2) it encroaches upon a legislative zone reserved for the legislature, and tends to establish law by non-adherence to the statutory intent and provisions; (3) it dismissed the action in replevin on the pleadings which were admitted to be true and sufficient in statutory scope and detail as prescribed by the legislature for petitioner's guidance and protection; (4) it denied petitioner a trial before a jury on the merits of the issue; (5) it failed to follow pertinent decisions of the Supreme Court of the State of Colorado, the Court of Appeals for the Tenth Circuit, or pertinent decisions of other Courts of Appeals, or the Supreme Court of the United States; and, (6) an important question of law is involved widely general in its nature and affects in the commercial world which would by such decision cause serious confusion concerning the sale, assignment and transfer of right, title and interest to Certificates of Stock, warehouse receipts, patents and other property evidenced by written instruments.

I.

1(a) The allegations in petitioner's Third Amended Complaint were greatly expanded from the original and those statutorily required by reason of respondents' series of motions, however, petitioner's action is closely similar to the issue in the case of *U. S. v. Butt*, 1953, 10 Cir., 203 F. 2d 643. In both cases the assignee brought suit in his own name, and in both cases there was attached to the complaint a copy of a promissory note, a copy of the mortgage or contract of pledge and a copy of the assignment from the mortgagor or pledgor, and wherein the Court held that, the assignment conveyed to the United States all the right, title and interest in the property and to any claim which the mortgagor or pledgor might have, and that an assignee may maintain an action on the assignment, citing 4 Am. Jur., Assignments, Sec. 34; 6 C. J. S., Assignments, Sec. 34; *Tome v. Dubois*, 1866, 6 Wall. 548, 73 U. S. 548, 18 L. Ed. 943; *Cook v. Ball*, 7 Cir., 144 F. 2d 423, 439; 42 A. L. R. 128, and other cases. The *Tome v. Dubois* case, supra, in pertinent part is recited in petitioner's Brief (TR. CCA-Brief) at pages 15-17, and at pages 19-24 significant cases are cited which concern ownership conveyed to an assignee of a Certificate of Stock, viz: *Black v. Zacharie*, 1845, 11 L. Ed. (3 How.) 690; *Hatch v. Std. Oil Co.*, 1879, 100 U. S. 124, 31, 25 L. Ed. (10 Otto) 554, 5; *Leonard v. Davis*, 1861, 17 L. Ed. (1 Black) 222, 5; *Slaughter v. Glenn*, 1878, 98 U. S. 242, 5, 25 L. Ed. 122, 3; *Talty v. Freedman's Trust Co.*, 1876, 93 U. S. 321, 23 L. Ed. 886, 7; *Helvering, Comr. I. R. v. Kaufman*, 1943, 4 Cir., 136 F. 2d 356, 8.

(b) An executed contract of sale, assignment and transfer of Certificate of Stock No. 46 was consummated by the registered owner thereof to petitioner by symbolical delivery of the Certificate of Stock No. 46 when manu-

al delivery thereof was not possible. As the court said in *Tome v. Dubois*, supra, at page 946 "Delivery is not essential, as it is well settled that when the terms of the sale are agreed upon, and the bargain struck, and everything the seller has to do with the property is complete, the contract of sale becomes absolute between the parties without delivery * * *." See also *Anderson v. Courtney*, 1950, 218 P. 2d 361, 4; *U. S. v. S. F. Elec. Ass'n.*, 57 F. S. 57, 67; Bowles v. Jung, 57 F. S. 701, 7; *Pac. Coop. v. U. S.*, 91 F. S. 572, 3; *Am. Surety Co. v. Baker*, 4 Cir., 172 F. 2d 689, 92, *Slaughter v. Glenn*, supra; *Crump v. Hill*, 105 F. 2d 124, 6; *In re Spain's Estate*, 46 N. Y. S. 2d 789, 91; *Livingston v. Powell*, 50 So. 2d 521, 5; *In re Millard's Estate*, 77 Pa. D & S 97; *Winslow v. Fletcher*, 4 A. 250, 5; In *Miller v. Hospelhorn*, 4 A. 2d 728, 33; In *Lyons v. Freshman*, 226 P. 2d 775, 7, citing *Richardson v. Int. Rev.*, 126 F. 2d 562; 140 A. L. R. 705 and *U. S. v. Rosebush*, 45 F. S. 664. In *Helvering, Comr. I. R. v. Kaufmann*, 4 Cir., 1943, 136 F. 2d 356, 8, the court said:

> "* * * It does not seem to be denied that stock certificates are only evidence of ownership, and that failure to deliver possession of the certificates does not of itself prevent passing of title to the stock from an owner to an assignee, if such is the intention of the parties."

(c) The decisions of the above cited authorities extending over the past 150 years, have clearly and consistently ruled: (1) That registration of stock transfers on the corporation's books is solely for the protection of the corporation and third parties taking transfers without notice of any prior equitable transfer; (2) That a duly executed sale, assignment and transfer of stock ownership by the registered owner conveys absolute ownership to the assignee and a valid title; (3) That a symbolical or con-

structive delivery of the Certificate of stock suffices, when actual delivery thereof is impossible or impracticable. RECOVERY OF PERSONAL PROPERTY WRONGFULLY WITHHELD IS THE BASIS OF C. R. C. P., RULE 104-REPLEVIN, PROVIDING:

A. That an assignee of a Certificate of Stock has a right to recover in an action in replevin possession thereof, and is at all times possessed of all redemption rights, and,

B. That neither the Uniform Stock Transfer Act nor any incorporation thereof in the statutes of the State of Colorado, C. R. S. Chap. 31, Art. 9, Secs. 1 to 9 inc., requires an assignee of a Certificate of Stock to register a transfer thereof on the corporation's books, nor does said Rule 104-Replevin nullify its basic purpose, requiring action plainly impossible of performance, when the property is wrongfully retained.

II.

2(a) Under the statutory corporation law of the State of Colorado, any registered owner of a Certificate of Stock retains ownership when the certificate of stock is pledged: C. R. S. Chap. 31, Art. 2, Sec. 14 (TR. CCA-Brief, pp. 9-10), and such owner is empowered to sell, assign and transfer such ownership. In *Reeves v. Stokel*, 1949, 120 Colo. 82, 208 P. 2d 94, a replevin action in which the Supreme Court of the State of Colorado in construing the statute: C. R. S. and C. R. C. P., Rule 104-Replevin (TR. CCA-Brief, pp. 6-7) held: That the pledgor held title which would pass to the purchaser, or assignee, and that when such a special interest in the property existed in a party he was entitled to its possession, thus meeting the requirements of C. R. C. P., Rule 104-Replevin. That decision was cited with approval by the same Court in

Gross v. Dreiling, 127 Colo. 420, 257 P. 2d 402, 3. In *McLeod v. Fourth Nat'l. Bk. of St. Louis*, 122 U. S. 528, 33, 30 L. Ed. 1237, the Court held: The real ownership of the property always remained in the pledgor who could sell it at any time. "The pledgee acquired no interest in the property except an interest for the debt, *and even where the legal title to incorporeal property, such as corporation stock is transferred to a pledgee as collateral security he takes only a special property therein. The general property remains in the pledgor after as well as before the default.*" (emphasis supplied). To the same effect in *Talty v. Freedman's Sav. & Trust Co.*, supra, and *In Re Rogers*, 20 F. S. 132. It is universally established that the pledgor retains ownership of the property, and that the pledgor can sell all right, title and interest therein at any time. In *Miller v. Wahyou*, 1956, 9 Cir., 235 F. 2d 612, 5, the court held: That a pledgor of corporate stock retained full title to the stock subject to lien and that there was no merit in the contention that the pledgor did not have an interest in the pledged shares to assign.

(b) Petitioner had proper right to maintain his replevin action whether his title was absolute, fiduciary, conditional, or qualified. In *Shipton v. Norrid*, 1872, 1 Colo. 404, the court said: "It is sufficient to aver the fact of his property and the injury * * * the property is admitted by the demurrer, and the declaration is clearly sufficient." The same Court in *Illinois Sewing Mach. Co. v. Harrison*, 43 Colo. 362, 3, 96 P. 177, said: "A complaint in replevin under the code which alleges that plaintiff is the owner, sufficiently answers the requirement that plaintiff is entitled to possession of the property. It is settled in this State, and seems to be the rule elsewhere that a general allegation of ownership is sufficient." To the same effect,

in *Hanauver v. Bartels*, 2 Colo. 514, 23; *Benesch v. Waggoner*, 12 Colo. 534, 21 P. 706; *Webster v. Kautz*, 22 Colo. App. 111, 17, 123 P. 139; *St. Aubin v. Marshall Field Co.*, 27 Colo. 414, 62 P. 199, 201; *Clay v. Martinez*, 74 Colo. 10, 13, 218 P. 903; *Harrison v. City of Denver*, 102 Colo. 98, 103, 76 P. 2d 110, 12; *Reeves v. Stokel*, 120 Colo. 82, 208 P. 2d 94; *Gross v. Dreiling*, 127 Colo. 420, 257 P. 2d 402; *Somerville Bk. v. Hornblower*, 1936, Mass., 119 N. E. 918; *In re Rogers*, 20 F. S. 120; *U. S. v. Rosebush*, 45 F. S. 664; *McLeod v. Fourth Nat. Bk. of St. Louis*, 122 U. S. 528, 33, 30 L. Ed. 1237; *Williams v. Williams*, 274 P. 2d 359, 62; *Baron v. Peoples Nat. Bk. of Secaucus*, 84 A. 2d 492, 3; *Journeymen Barbers v. Pollino*, 120 A. 2d 767, 73; Restatement-Trusts, Sec. 2, comment (d):-Title and ownership.

In *Blackner v. Blackner*, 87 Colo. 483, 289 P. 366, 7, replevin action to recover certificates of stock, the Supreme Court of the State of Colorado said: "The complaint alleged plaintiff's ownership and right to possession and unlawful detention by defendant. * * * These allegations state a cause of action * * * and the demurrer to it was properly overruled." In *Denver Onyx Co. v. Reynolds*, 1895, 10 Cir., 72 F. 464, the Court recited the history of the law pertaining to actions in replevin in the State of Colorado, and pleadings therein which the court said were plain and simple. Significantly, no change has been made therein by the legislature to the present time. The Court further holding: That under the code of the State of Colorado an action in replevin may be maintained in all cases where the plaintiff is the owner of the property, or ENTITLED to possession thereof, and that under the code the action for recovery of personal property lies, by one entitled to possession, against one wrongfully holding the possession. To the same effect, in *Baron v. Peoples Nat. Bk. of Secaucus*, 84 A. 2d 492, 3, the court said: " 'Replevin,

or equitable replevin may be maintained for a certificate of stock where the object is to *regain possession of the specific paper and NOT TO TEST THE RIGHT TO THE PROPERTY WHICH IT REPRESENTS*' (emphasis supplied) 46 Am. Jur. 22, page 15. Also, 'A certificate of stock, that is, the certificate itself as distinguished from the stock which it represents, is undoubtedly property; * * * and it has a primary value separate and distinct from the value of the shares it represents. * * * And if it is wrongfully detained from the true owner, or wrongfully converted by another, it may be recovered in an action of detinue or replevin * * *' 11 Fletcher, Cyclopedia of Corporations (Perm. Ed.) 62, par. 5097, citing cases."

III.

3. A Certificate of Stock under the statutes of the State of Colorado, its corporation laws and its larceny act, provide: (a) That the Certificate of Stock itself is personal property; (b) that the certificate itself has intrinsic value and separate and distinct from the intangible corporate stock which it represents; (c) that the assignee of all right, title and interest in and to the Certificate is the absolute owner thereof; (d) that when the certificate is wrongfully retained from the assignee, he has a right of recovery thereof by an action in replevin under C. R. S., C. R. C. P., Rule 104-Replevin; (e) that such assignee out of possession of the certificate, need only plead under said Rule 104, that he is the owner of the certificate, that he has a right to its immediate possession, and that it is wrongfully withheld from him. The Supreme Court of the State of Colorado has consistently construed said statutory pleadings under said Rule 104 as sufficient to state a cause of action replevin for the recovery of personal property out possession, for recovery of compensatory dam-

ages for its wrongful detention, and for payment of the value of the property should its delivery not be possible.

There is no statute of the State of Colorado, nor any decision of its Supreme Court, that requires an assignee of a Certificate of Stock to surrender same to the issuing corporation for cancellation and transfer thereof on its books. The sole purpose and intent of the Stock Transfer Act is to provide a uniform means of effecting a recordation of transfer of title to the intangible corporate stock as represented by the Certificate of Stock, provided, the owner or assignee of the certificate voluntarily elects so to do, at any time during his tenure of ownership of the Certificate of Stock, anything to the contrary notwithstanding. It cannot be said that conveyance of all right, title and interest in and to a Certificate of Stock, and the acquirement of absolute ownership of the specified personal property, viz, the Certificate of Stock, by a duly executed sale, assignment and transfer thereof to the purchaser or assignee by its registered owner, conveys nothing, unless or until the Certificate of Stock is surrendered for cancellation and transfer on the corporation's books. Nor can it be said that a condition precedent remains unfulfilled by the failure of an assignee to effect said record transfer, and, even if such action was a requisite to convey ownership of the Certificate of Stock to the assignee, when such transfer was made impossible of performance by wrongful retention of the Certificate of Stock, the assignee would have a right to first recover the Certificate, so that, such condition precedent could be made possible of performance. In *Stearns v. U. S.*, 291 U. S. 54, 61, 78 L. Ed. 647, 53; the court said: "He who prevents a thing from being done may not avail himself of the non-performance which he himself has occasioned, for the law says to him in effect 'this is

your own act, and therefore you are not damnified (citations).'"

The court below was required to follow the principles of law as laid down by this Court, to apply the statutory law of the State of Colorado and to follow the interpretations thereof as made by the Supreme Court of the State of Colorado.

In *Mullane v. Cent. Hanover Tr. Co.*, 339 U. S. 306, 14, the court said: "The fundamental requisite of due process of law is the opportunity to be heard. Grannis v. Ordeau, 234 U. S. 384, 394."

In *Woods v. Klobuchar*, 1958, 7 Cir., 257 F. 2d 313, 5, the court said: "It is well established that a federal court adjudicating a state created right solely because of diversity of citizenship is, in effect, only another state court and cannot substantially affect the enforcement of a right given by the State; that Congress has afforded out-of-state litigants another tribunal but not another body of law." In *U. S. v. Am. Nat. Bk. of Jacksonville*, 1958, 8 Cir., 255 F. 2d 504, 6, the court said: "* * * the rules of property and the fixing of incidents of property ownership are rules of state law which federal courts will respect. Poe v. Seaborn, 282 U. S. 101, 51 S. Ct. 58, 75 L. Ed. 239." In *Harris v. Egger*, 1915, 6 Cir., 226 F. 389, 95, the court held: That the statutory rule of the State would be recognized, and enforced in federal courts (numerous citations) The court further held: That the title to the stock passes and becomes complete in the purchaser upon the assignment of the certificate without registration or transfer on the stock book of the corporation (numerous citations), and that where ordinary personal property is distinctly identified and sold, and the purchase price paid, title passes without delivery.

Under the F. R. C. P., Rule 12, the court held in *Olan v. Enterprise*, 1954, 5 Cir., 210 F. 2d 895, 97, that a motion to dismiss admits all the well pleaded allegations of the complaint, that replecation thereto must be made by answer, since pleas are abolished under the federal rules of civil procedure, and that there may be an issue for the jury on the subject together with other issues. Such matters belong to a trial before the court and a jury, not by a motion to dismiss which admits so much. To the same effect in *Stanton v. Larsh*, 1956, 5 Cir., 239 F. 2d 104, 6; *Dotschay v. Nat. Mut. Ins. Co.*, 1957, 5 Cir., 246 F. 2d 221, 3; *Ryan v. Scoggin*, 1957, 10 Cir., 246 F. 2d 54, 57; *Carass v. Outboard Marine Corp.*, 1958, 5 Cir., 252 F. 2d 690; *Polk v. Glover*, 305 U. S. 5, 6, 83 L. Ed. 6; *Dietrick v. Greany*, 309 U. S. 190, 6, 84 L. Ed. 694; *Hardware Mut. Ins. Co. v. Snyder*, 3 Cir., 137 F. S. 812, 3. Petitioner's action was dismissed on the pleadings, and upon the erroneous theory that he had not complied with the Stock Transfer statute of the State of Colorado, which in all respects represents an adaptation of the Uniform Stock Transfer Act. The unwarranted nature of such opinion as a basis of dismissal, particularly when any such action on the part of petitioner was unnecessary, and otherwise made impossible of performance, is exemplified by the Supreme Court of the State of Indiana in the case of *Fardy v. Mayerstein*, 47 N. E. 2d 315, wherein the court said at page 317:

> "(2) Ordinarily, because of the fiduciary relationship created by the pledge, a pledgee may not purchase the subject of the pledge at his own sale. 41 Am. Jur. Pledge and Collateral Security, § 90, and notes in A. L. R. therein cited. The same text, § 93, states that 'the provisions in a pledge agreement authorizing the pledgee to purchase the property will be strictly construed, being in derogation of the common law. * * *'"

and at page 318:

"(9-12) As between the parties the Uniform Stock Transfer Act, Burns' Ann. St. § 25-701 et seq., does not make an owner out of a pledgee against the express terms of a written contract between them. If there were any case so holding we should expect to find it among cases cited in Vol. 6 of the Uniform Laws Annotated. While there are numerous statements in the cases therein cited which pieced together might afford argument for such result, we find no decision squarely in point. The purpose of the statute was not, primarily at least, to determine ownership but to make uniform in the states the method of transferring title where such transfer is necessary to carry into effect contracts for disposition of stock. * * * It is sufficient here to say that where there is an express contract by the owner of record creating a pledge to secure his debt, the other party to the contract becomes a pledgee with, as the cases say, a lien upon the stock. One does not have a lien upon his own property. He may convert the lien into ownership by foreclosure. His unsuccessful attempt so to do in this case left him with the status of pledgee."

Petitioner in his action in replevin sought possession of Certificate of Stock No. 46, the personal property as duly sold and assigned to him, and wherein he acquired absolute title to that specified Certificate of Stock No. 46. No matter concerning the recording of Certificate of Stock No. 46 on the books of the corporation was in issue in petitioner's replevin action. Noteworthy, is the fact that the District Court had denied petitioner's motion under the Discovery process, F. R. C. P., Rules 33 & 34, denied his motion for issuance of summons to new party defendants, under F. R. C. P., Rule 19(b), and denied his duly filed demand for a trial before a jury, under F. R. C. P., Rule 38. In the case of *Societe Internationale v. Rogers*, 1958, 357 U. S. 197, 2 L. Ed. 2d 255, 65, 78 S. Ct.

1087, the court said: "* * * that no person shall be deprived of property without due process of law * * * there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording the opportunity for a hearing on the merits of his cause." It is well settled that, where reasonable minds might draw different conclusions, that a question of fact is presented requiring determination by a jury. A glaring example of such a situation concerning a question of fact, or a mixed question of fact and law, is illustrated in the majority opinion of the Court of Appeals, compared with the dissenting opinion as rendered and entered in petitioner's action in replevin, and in contrast and conflict with prior decisions, e.g., the Colorado cases of *Denver Onyx v. Reynolds*, *Blackner v. Blackner*, supra, and other citations above, which cases, as petitioner's, were distinctively possessory actions for recovery of personal property.

CONCLUSION

The nature and effect of the issue involved in this case is of far reaching importance, and of great public interest in the uses and customs of transfers and assignments of Certificates of Stock and similar commercial paper, and wherein grave constitutional questions are involved, and which issue has not heretofore been directly decided and settled by this Court. For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JOSEPH M. BRENNAN,
Petitioner, Pro Se.

P.O. Box 1115
Denver 1, Colorado

APPENDIX

OPINION

(January 5, 1959)

Joseph M. Brennan, pro se.

V. G. Seavy (Seavy and Seavy was with him on the brief) for appellees.

Before Bratton, Chief Judge, and Huxman and Lewis, Circuit Judges.

BRATTON, *Chief Judge:*

Joseph M. Brennan instituted this action in replevin to recover possession of fifty shares of corporate stock issued by Rock Wool Insulating Company to Earl P. Melia. In the third amended complaint Rock Wool Insulating Company, W. A. Wills, Ltd., Speken Wrecking Co., M. P. M. Investment Company, W. A. Wills, Herman Speken, William Greenberg, and Herbert F. Korholz, were joined as defendants. While not pleaded in conventional manner, it is fairly apparent from the face of the pleading considered as a whole that jurisdiction of the action was predicated upon diversity of citizenship with the requisite amount in controversy. It was pleaded that plaintiff acquired his right to the stock by assignment from Melia. Judgment was entered dismissing the action upon the ground that the third amended complaint failed to show compliance with the statutes of Colorado necessary to transfer to plaintiff title to the shares of stock and that plaintiff had no title thereto.

It is the general rule in Colorado that replevin is a possessory action in which plaintiff must rely upon his own title or right of possession and not upon any defect or weakness in the position of the defendant respecting title

or right of possession. Hall v. Johnson, 21 Colo. 414, 42 Pac. 660; Kelly v. Lewis, 38 Colo. 18, 88 Pac. 388; Illinois Building Co. v. Patterson, 91 Colo. 391, 15 Pac. (2d) 698; Barslund v. Anderson, 106 Colo. 238, 103 Pac. (2d) 23. And the controlling issue in replevin is the right to immediate possession of the property at the time of the institution of the action. Brown v. Driverless Car Co., 86 Colo. 216, 280 Pac. 488.

It is provided by statute in Colorado, C. R. S. 1953, 31-9-1, that title to a certificate and to the shares of stock represented thereby can be transferred only by delivery of the certificate endorsed either in blank or to a specified person by the person appearing in the certificate to be the owner of such stock, or by delivery of the certificate and a separate written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. And it is further provided by statute in that state, C. R. S. 1953, 31-9-10, that an attempted transfer of title to a certificate of stock or to the shares represented thereby without delivery of such certificate shall have the effect of a promise to transfer; and that the obligation, if any, imposed by such promise shall be determined by the law governing the formation and performance of contracts. When these statutes are considered together, it is clear that in Colorado legal title to shares of stock issued by a corporation organized under the law of that state can be effectively transferred in only one or the other of two methods. One method is by delivery of the certificate with an endorsement thereon in blank or to a specified person, signed by the person appearing in the certificate to be the owner thereof. The other is by delivery of the certificate and a separate document con-

taining a written assignment or a power of attorney to sell, assign, or transfer the same, signed by the person appearing in the certificate to be the owner of the stock. These methods are exclusive, and any attempt to transfer stock without delivery of the certificate does not have the effect of passing title but merely constitutes a promise to transfer. Johnson v. Johnson, 300 Mass. 24, 13 N. E. (2d) 788; Knight v. Shutz, 141 Ohio St. 267, 47 N. E. (2d) 886; Manna v. Pirozzi, 44 N. J. Super. 227, 130 Atl. (2d) 55; Hardy v. Musicraft Records, 98 Cal. App. (2d) 698, 209 Pac. (2d) 839.

Manifestly drawn without the aid of an attorney, the third amended complaint contained many allegations not ordinarily found in the complaint in a conventional action to replevin stock. Certain allegations were contained in the pleading respecting the relationship of employer and employee existing between the defendant Rock Wool Insulating Company and Melia; respecting coercive methods used to compel Melia to absent himself from a certain meeting of the directors of the defendant Rock Wool Insulating Company; respecting coercive methods employed to compel Melia to execute and deliver his resignation as director of such corporation; respecting fraudulent methods and means through which the defendant Korholz obtained control of the defendant Rock Wool Insulating Company and mismanaged its affairs; and respecting the fraudulent exploitation of the assets and earnings of the defendant Rock Wool Insulating Company. Stripped of all allegations of such nature, it was pleaded that certificate No. 46 for fifty shares of capital stock of the defendant Rock Wool Insulating Company was issued to Melia; that Melia and his wife obtained a loan of $1200 from the defendant W. A. Wills, Ltd., and pledged the stock as security therefor; that the stock was pledged without any

right or grant from Melia to any of the defendants to transfer title to any other party or parties on the books of the corporation; that Melia offered to repay to the defendant W. A. Wills, Ltd., the loan of $1200 with accrued interest; that Melia was advised that the stock had been transferred to the defendant Korholz; that the defendant Korholz advised Melia that the stock had been delivered to the defendant Speken; that the defendant Speken advised Melia that he would carry the loan indefinitely if the interest were paid as it accrued for each period of six months; that thereupon Melia paid to the defendant Speken the interest due for the first six months, and continued to pay such interest thereafter; that on a certain date Melia tendered $1200 in cash to the defendant Speken and demanded delivery of the stock; that Speken refused to accept the tender; that Melia mailed to the defendant Speken a check for $1224 bearing the inscription "Payment in full for loan of my $1,200.00 on pledged stock certificate No. 46 registered in my name * * *"; and that such check was received and remained in the possession of the defendant Speken. It was further pleaded that Melia and his wife, sold, assigned, and transferred the stock to plaintiff by means of a separate instrument in writing not endorsed upon or attached to the certficate; and that such stock was not delivered to plaintiff for the reason that some of the defendants—the one or ones not being known to plaintiff—possessed and retained it. And it was further pleaded that plaintiff advised the defendants by registered mail of the sale and assignment of the stock to him and demanded that a time and place be designated at which he could tender and make payment of the loan and have the stock delivered to him; that the defendants failed, neglected, and refused to make reply to such notice and demand; that plaintiff notified the defendants that the sum of $1200 was being

held by the collection department of a named bank in Denver, Colorado, with directions to pay it to the party who should make delivery and surrender of the stock to the bank; that plaintiff had always been ready, able, and willing to repay the loan; and that plaintiff "now brings said tender into court ready to be paid to said defendant * * *". The assignment from Melia and wife to appellant without delivery of the certificate did not have the effect of vesting in appellant title or ownership of the shares of stock. It merely constituted a promise to transfer the stock; and the obligation, if any, imposed by such promise is to be determined by the law governing the formation and performance of contracts. But this is not an action between appellant and Melia and his wife for the enforcement as between them of rights under such an obligation. It is an action in replevin to obtain the immediate possession of the stock from the party or parties appellee who holds or hold it as a pledge for the unpaid note of Melia and his wife. And having nothing more than an obligation to transfer the stock to him, appellant cannot maintain such an action in replevin to obtain its immediate possession.

The judgment is

Affirmed.

Judge Huxman dissenting.

I fail to see where the title to stock or the transfer of title under the Colorado Certificate Stock Transfer Act, set out in the majority opinion, is a factor in this case. This is not a case involving the title or ownership of the 50 shares of stock represented by Certificate Number 46. In his prayer plaintiff prays, "that he have and recover possession of said certificate of stock No. 46." It is true that in addition he prays that "the right and title to said

stock ownership be declared to rest in plaintiff." It is axiomatic that the prayer forms no part of the cause of action and that a plaintiff will be awarded such relief as is warranted by the complaint. Plaintiff was not entitled to have judgment declaring him to be the owner of this stock but if he could establish the allegations of his complaint, set out herein, he was entitled to have judgment for the possession of Stock Certificate Number 46.

This is strictly a replevin action in which the plaintiff seeks to recover a specific piece of paper, to-wit: Stock Certificate Number 46. The complaint is inartistically drawn, but stripped of its verbiage it is clear that plaintiff seeks to recover a specific stock certificate. All that is necessary for him to allege or to establish in order to prevail is that he is entitled to the possession of the stock certificate, that it is unlawfully withheld from him, that demand has been made for its surrender, and that compliance with such demand has been refused, and this the petition does. Thus it is alleged that, "Defendants are now in possession of certificate of stock No. 46, representing ownership of fifty shares of capital stock in Rock Wool Insulating Company, a Colorado corporation. * * * Plaintiff is unable to state which one or ones of said defendants now wrongfully possess and withhold said certificate of stock No. 46, to which plaintiff has the immediate right of possession by virtue of a duly executed assignment of said certificate of stock No. 46 * * *." It alleges that the stock certificiate has been pledged with the defendants and could not be delivered to him "for the reason that some of said defendants, as above alleged, wrongfully and unlawfully possess and forcibly retain same and upon good tender and demand, as herein alleged, have failed and refused to deliver said certificate of stock No. 46 to plaintiff * * * and by such acts and conduct of defendants, and

each of them, plaintiff is unable to obtain possession of such stock certificate No. 46, to which he is lawfully entitled. * * *"

While the authorities hold that the title or ownership of shares of stock represented by a stock certificate may not be raised in a replevin action, they do hold, so far as I can find, without exception, that the right to recover a specific stock certificate is a proper subject for such an action.

46 Am. Jur., Replevin, § 22 states, "Replevin, or equitable replevin, may be maintained for a certificate of stock, where the object is to regain possession of the specific paper, and not to test the right to the property which it represents." In Somerville National Bank v. Hornblower (Mass.) 199 N. E. 918, while the court held that stock in a corporation could not be recovered by replevin, it did hold that a specific stock certificate could be so recovered. The Court said, "Replevin, or equitable replevin, may be maintained for a certificate of stock." In Campbell v. Brooks, 47 So. 545 (Miss.), the court recognized "that a writ of replevin will lie for the recovery either of deeds or certificates of stock, where the object is to regain possession of the specific paper and not to test the right to the property which it represents." In Bush v. Hillman Land Co., 2 Atl. 2d 133 (Del.), the court held that replevin would lie to recover a specific stock certificate.

It may be well that upon a trial of the issue, plaintiff may fail to establish that he is entitled to the possession of this stock certificate but that can only be determined after a trial upon the merits. In my opinion, the complaint stated a cause of action and the trial court erred in dismissing the complaint.

I would REVERSE and REMAND for a trial on the merits.

JUDGMENT

Before Honorable Sam. G. Bratton, Chief Judge, and Honorable Walter A. Huxman and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by the court that the judgment of the said district court in this cause be and the same is hereby affirmed.

ORDER DENYING PETITION FOR REHEARING

Twenty-third day, January Term, Friday, February 6th, 1959.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Walter A. Huxman and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.